(30,284)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 924

A. J. BUCK, APPELLANT,

vs.

E. V. KUYKENDALL, DIRECTOR OF PUBLIC WORKS OF THE STATE OF WASHINGTON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

INDEX

	Original	Print
Names and addresses of counsel	1	1
Record from U. S. district court	2	1
Amended complaint	2	1
Motion to dismiss	20	12
Order sustaining motion to dismiss	21	12
Order dismissing complaint	22	13
Order fixing appeal bond	23	13
Assignment of errors	24	14
Bond on appeal (omitted in printing)	25	14
Præcipe for transcript of record	29	15
Appellee's præcipe for transcript of record	30	15
Complaint	32	16
Opinion, Neterer, J	46	25
Motion to dismiss	55	32
Affidavit of E. V. Kuykendall	56	32
Opinion, Neterer, J	59	34
Order denying motion to dismiss	65	39
Clerk's certificate	66	40

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 7, 1924

[fol. 1] NAMES AND ADDRESSES OF ATTORNEYS

Crawford, W. R., 325 Lumber Exchange Building, Seattle, Washington, Attorney for Appellant.

Dunbar, John H., Attorney General of the State of Washington, Olympia, Washington; Clifford, Raymond W., Assistant Attorney General of the State of Washington, Olympia, Washington; Brodie, H. C., Assistant Attorney General of the State of Washington, Olympia, Washington, Attorneys for Appellee.

[fol. 2] IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

In Equity

No. 189

A. J. BUCK, Plaintiff,

vs.

E. V. KUYKENDALL, director of Public Works of the State of Washington, Defendant

AMENDED COMPLAINT—Filed December 22, 1923

To the Honorable Judge of the District Court of the United States for the Western District of Washington, sitting in equity:

A. J. Buck files this his amended complaint, by leave of Court first obtained, against E. V. Kuykendall, Director of Public Works of the State of Washington, Defendant; and thereupon complains of the Defendant and shows unto your Honor as follows:

1

That A. J. Buck, plaintiff, is a citizen of the State of Washington, residing at Tacoma.

2

That E. V. Kuykendall, defendant, is now and has been since the spring of the year 1921 the duly appointed, qualified and acting Director of Public Works of the State of Washington, and is a citizen of such State, residing at Olympia.

3

That Congress duly enacted on July 11, 1916, an act entitled:

"An act to provide that the United States hall aid the States in the construction of rural post roads, and for other purposes."

That according to the provisions of the said act the Federal Gov- [fol. 3] ernment agreed to furnish moneys to States for the purpose of aiding in the building of Post Roads, provided any State desiring such aid would first pass necessary legislation adoptng the provisions of the Federal act. That thereafter the legislature of Washington did duly enact a certain law, entitled:

"An Act relating to public highways, rural post roads, assenting to the provisions of an act of Congress entitled 'An act to proviide that the United States shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11, 1916; authorizing and directing the highway commissioner, the State highway board and the State treasurer to perform certain duties in connection therewith; providing for the apportionment of certain funds therefor; and declaring an emergency;"

being chapter 76 of the laws of 1917. That such law is herein referred to and made a part hereof the same as if set out in full. Such law went into force and effect immediately upon passage and is now in full force and effect. That by the provisions of said law the State of Washington adopted all the terms and conditions contained in said Federal Act and agreed to abide thereby.

That thereafter Congress duly enacted an Act entitled:

"An Act to amend the act entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11th, 1916, as amended and supplemented, and for other purposes;"

which act was passed November 9, 1921, and is now in full force and effect. That both of said Federal Acts provide that all roads recieving any part of the appropriations provided for should be free of tolls of all kinds. That according to the provisions of said Federal Acts and the State act, full and complete plans for the construction and reconstruction were duly presented by the State and adopted by the Federal Government. That the State highway, commonly known as the Pacific Highway as well as other State roads, were constructed and recon- [fol. 4] structed by such Federal aid, for the purpose of having a complete and improved Public Highway, extending from Britiish Columbia to Mexico in order to furnish means of communication in Interstate Commerce, being also International in character. That said "Pacific Highway" has been constructed and reconstructed from the said British Columbia through the States of Washington and Oregon and is open for and being used by traffic. That the Federal Government has paid over to the State of Washington and the said State has recieved the same large sums of money which has been expended under the provisions of said Federal Act upon said "Pacific Highway" as well as on other rural post roads in said State. That the plaintiff has been informed, believes and so charges

the fact to be, that not less then one quarter of the entire cost of the construction and reconstruction of the said "Pacific Highway" located between Seattle and Vancouver, Wash. was borne by the Federal Government. That the distance by said highway between said Seattle and Vancouver, Wash. approximately 194 miles.

That all of said portions of said "Pacific Highway", as aforesaid, being constructed and reconstructed as aforesaid are now used for traffic and this plaintiff is entitled to and claims the right, under said Federal Acts and State act to oper- his motor propelled vehicles over such portions of said highway as well as other rural post roads as thoro-fares, subject however to proper regulations in such operations. That under the same provisions of the same Federal Acts, the State of Oregon, having adopted such acts by its legislature, has also recieved and expended a large percentage of the entire cost of construction and reconstruction of the said "Pacific Highaway" from the Oregon line at Vancouver, Washington, to Portland, Ore-
[fol. 5] gon. That the Washington legislature duly enacted a law entitled;

"An Act relating to the use of the Public Highways and the rights and remedies of persons thereon, providing for the licensing of motor vehicles and collecting, distribution and expenditure of fees therefore, fixing penalties for violations thereof, and repealing chapter 153 of the laws of 1913 and chapter 142 of the laws of 1915;"

Being chapter 96 of the session laws of 1921, and thereafter amended some of the sections thereof by a law duly enacted, entitled:

"An act relating to the use of the Public Highways and the rights and remedies of persons thereon, and amending sections 6313, 6328, 6330, 6332, 6335, 6339, 6340, 6355 and 6358 of Remington's Compiled Statutes, adding thereto a new section to be known as section 6358-1 and declaring that this act shall take effect immediately;"

Being chapter 181 of the laws of 1923. Such law, as amended, is now in full force and effect. That such law, as amended provides the entire rules and regulations for the government of traffic on the Public Highways of the State; also fixes the fees to be paid and in section 7 thereof authorizes the issue of said Public highways to all motor vehicles duly licensed under the provisions of said law; and further penalties for failure to obey any and every provision of said law, as amended, for any violation thereof. That such law, as amended, is hereby referred to and made a part hereof as if set out in full. That this plaintiff has complied with each and every provision of said law, as amended and is ready, willing and able at all times hereafter to comply therewith.

5

That the Washington legislature duly enacted a law entitled:

[fol. 6] "An act relating to the operation of vehicles and the use of Public Highways, providing for the licensing of persons operating

motor vehicles, providing for the enforcement thereof and all other highway and motor vehicle laws and prescribing penalties for violations thereof; and making appropriations;"

being chapter 108 of the session laws of 1921, which law was thereafter amended in part by *by* a law duly enacted, entitled:

"An act relating to the operation of vehicles and the use of Public highways, providing for the licensing of persons operating motor vehicles, providing for the enforcement thereof and all other highway and motor vehicle laws and prescribing penalties for violation thereof; and amending Section 234-22 of Pierce's Code, and adding a new section;"

being chapter 122 of the session laws of 1923. Such law, as amended, provides for each operator of a motor vehicle to procure a license to drive the same, paying a fee therefor. That this plaintiff and his drivers have complied with all the provisions of said law as amended and are ready, willing and able at all times to comply therewith. That such law as amended is hereby referred to and made a part hereof as if set out in full.

That the above laws, as amended, to-wit, chapter 96 of the Session laws of 1921 and chapter 108 of the Session laws of 1921, are the only laws now in full effect and force enacted by the State of Washington relating to the operation of motor propelled vehicles on the Public Highways of said State, except the law hereafter referred to, being chapter 111 of the Session laws of 1921, as amended.

6

That the State of Washington duly enacted a law, entitled:

"An act providing for the additional supervi*o*sion and regulation of the transportation of persons, and property for compensation over any Public highway by motor propelled vehicles: Defining transpor-
[fol. 7] tation companies and providing for additional supervision and regulation thereof by the Public Service Commission, providing for the enforcement of the provisions of this act and for the punishment of the violations thereof;"

being chapter 111 of the Session laws of 1921, and thereafter Section 9 of the said law was duly amended by a law, entitled:

"An Act to *l*elieve the general fund of the expense of regulating and supervising auto transportation companies, creating a fund and providing fees to cover the cost of such regulation, and amending Section 9 of chapter 111 of the laws of 1921, and making an appropriation;"

being chapter 79 of the Session laws of 1923. That said law went into full force and effect in June, 1921, and as now amended is in full force and effect. Such law, as amended, is hereby referred to and made a part hereof as if set out in full. That by the provisions of

said law, as amended, the Defendant, as Director of Public Works, is vested with sole and exclusive authority, and it is made his duty, to enforce the provisions of said law, as amended, and to order the institution of actions, both civil and criminal, against persons or corporations for any alleged violayions thereof. Further said defendant is vested with sole authority to grant or refuse to any person or corporation to operate on the Public highways of the State who come within the defination of auto transportation companies as set out in said law. Such law also provides that no license can be granted by said defendant to operate in the same territory occupied by another certificate holder unless the latter fails, refuses or declines to obey the proper orders of said defendant, and then only after a proper hearing. Such law, as amended, vests said defendant with the sole jurisdiction and authority to control, supervise and regulate said auto transportation companies in all matters, including making, altering or changing the rates of fare or time schedules. Such law, as [fol. 8] amended, also provides that surety Bonds or liability insurance must be carried on each motor vehicle operated, the premium for each policy vary from $200.00 a year to over $400.00 a year, depending on the carrying capacity of the vehicle bonded or insured. That said law, as amended, provides that a violation of any provision thereof or the failure to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement made by the department shall constitute a gross misdemeanor and punished as such, being either a fine or imprisonment or both.

7

That under the provisions of said law, chapter 111 of the session laws of 1921, as amended, the defendant has granted and has issued to the Park Auto Transportation Company a certificate to operate between the Cities of Seattle and Tacoma, on the said "Pacific Highway," and the said grantee is now operating between said two Cities and is carrying passengers between said two Cities and intermediate points; that another certificate under said law has been issued to the Thompson-Smith Company to operate between the Cities of Tacoma and Olympia, on said "Pacific Highway," carrying passengers between said points and intermediate points; a certificate also has been granted under said law to the Northwestern Transportation Company to operate between the Cities of Olympia and Kelso, on the said "Pacific Highway," carrying passengers between said points and intermediate points; and further; a certificate has been issued under the said law to the Camas Stage Company, a Washington Corporation, to operate between Kelso, Washington, and Portland, Oregon, over the said "Pacific Highway," carrying passengers between said points and intermediate points.

[fol. 9] That each one of said companies so operating as above stated has no authority to operate except between said points on said highway as named in its certificate. That the said defendant, although petitioned so to do, has never issued and has refused to issue any certificate under the provisions of said law of 1921, as amended, to any person or corporation for the purpose of carrying

through passengers on said "Pacific Highway" between Seattle or Tacoma and the boundary line of the State of Washington and Oregon, and that there is not now any certificate holder entitled to operate a through service on said "Pacific Highway" from Seattle or Tacoma either to the southern boundary line of the State of Washington or to Portland, Oregon. That there is not now any through line whatever operated between said Cities of Seattle or Tacoma, Washington, and Portland, Oregon, carrying through passengers by motor vehicles stages between said points on said "Pacific Highway" or any other highway. Further, that said above companies by virtue of the certificates granted to them under the provisions of said law are using said parts of said "Pacific Highway" as places of business, taking on and discharging passengers along said highway. Further that certificate holders are operating as set out above motor busses which carry from 25 to 30 passengers each and stop on and along said highway to take on and discharge passengers, using said highway for doing business and not as a thoroughfare. That the plaintiff does not intend to and will not operate any motor vehicle of larger carrying capacity, wider or heavier than the motor vehicles operated by said certificate holders which have been authorized to be used by the said defendant. That *that* said Public Highways, including the "Pacific Highway" are not being obstructed or interfered with nor is [fol. 10] the traveling public thereon inconvenienced by the said operation of said certificate holders, doing entirely a local business between their termini as aforesaid. That plaintiff in his operation does not intend to and will not stop on or along said public highways to take on or discharge passengers and will not cause any hindrance to traffic on said highway or inconvenience to the traveling public thereon.

8

That this plaintiff has been engaged for many years last past in the business of transporting passengers by motor stage in the State of Washington and after a careful examination has found, after interviewing more than a thousand people in the Cities of Seattle and Tacoma, Washington and adjacent territory, and Portland, Oregon, that there is a demand for a through stage line to carry persons between Seattle and Tacoma, Washington and Portland, Oregon. That such a line had been in operation prior to December 1922 for many months running a daily schedule, which line was compelled to stop operation in December 1922 on account of the threats of the defendant herein to cause the arrest of the officers, agents and drivers of said line claiming it was illegally operating such interstate business not having received a certificate under the provisions of chapter 111 of the session laws of 1921 and for no other reason whatsoever. That during the operation of said stage line for a period of 9 months it had been financially successful charging $5.50, between Seattle and Portland and $4.50 between Tacoma and Portland. That since the discontinuance of said line as aforesaid there has not been and there is not now any through stage line operated between the said Cities of Seattle, Washington, and Portland, Oregon, as aforesaid.

9

[fol. 11] That the plaintiff herein is the grantee and owner of a certificate issued by the State of Oregon authorizing him to operate motor propelled vehicles carrying passengers on the "Pacific Highway" between the City of Portland, Oregon, and the northern boundary line of the State of Oregon, at Vancouver, Washington as a continious stage line between the Cities of Portland, Oregon, and Tacoma and Seattle, Washington. That the plaintiff is obliged to, by the terms and conditions of said certificate, operate said line on or before November 12, 1923, or the said certificate will be revoked and cancelled. That the plaintiff has complied with all the laws of Oregon in respect to said certificate, including the payment of the necessary fees therefor. The said certificate was so granted by the railroad Commission of the said State of Oregon under the provisions of the law of Oregon duly enacted;

"An act providing for the supervision and regulation of the transportation of persons and property for compensation over any Public Highway by motor vehicles, motor trucks, motor busses, bus trailers, semi-trailers and other motor trailers used in connection therewith, and by other motor vehicles; defining what constitutes transportation for compensation, defining transportation companies, and providing for the supervision and regulation thereof by the Public Service Commission of Oregon; providing for the enforcement of the provisions of this act and for the punishment for violations thereof, and declaring an emergency;"

being chapter 10 of the Special Session Laws of 1921, as amended by chapter 205, General Laws of Oregon of 1923; that such law, as amended, is now in full force and effect. Such law is hereby referred to and made a part hereof as if the same was set out in full. That the plaintiff has duly filed his time schedule and tariff with said commission. That the rate of fare so provided for is $5.60 between Portland and Seattle and $4.60 between Portland and [fol. 12] Tacoma. That the present time table provides for triweekly trips both ways between said Cities of Portland and Seattle with the right under the said law of Oregon to increase such schedule whenever the plaintiff may desire.

10

That the plaintiff, being desirous of engaging in interstate commerce by transporting persons for compensation between the Cities of Seattle and Tacoma, Washington, and Portland Oregon, and not doing any Intrastate business whatever and in order to carry on such business subject to all laws, rules and regulations of the State of Washington, did duly apply to the defendant herein for a certificate under the provisions of chapter 111 of the laws of 1921. That such application, sworn to by the plaintiff, was prepared on the form furnished by the defendant. That such printed form contained the following, being clause 13 thereof and reading as follows:

"Applicant is familiar with the provisions of chapters 96, 108 and 111, Session laws of 1921, and the Rules and Regulations of the Department of Public Works of Washington, governing the equipment and operation of motor vehicles upon the highways of the State of Washington and promises prompt compliance therewith."

That the plaintiff had complied and has complied with all of the laws, rules and regulations of the Department of Public Works in connection with the said application. That the said law chapter 111 and the rules and regulations of the said Department of Public Works required the plaintiff to do or perform no other thing in connection with the said application than he had done and performed. Further, the plaintiff on oath had promised prompt compliance with the provisions of chapters 96, 108 and 111, of the session laws of 1921, governing the equipment and operation of motor vehicles upon the Public Highways of the State. That the [fol. 13] plaintiff had and has complied in all respects with the provisions of Chapter 96, of the Session laws of 1921, as amended, and Chapter 108, of the Session laws of 1921, as amended, as hereinbefore alleged. That the said defendant herein in June 1923, entered an order on said application denying a certificate or license to said plaintiff to engage in said interstate commerce solely upon the grounds that the local service furnished by the said 4 certificate holders and the train service furnished adequate transportation between Seattle and Tacoma, Washington and Portland, Oregon; and that plaintiff if granted a certificate did not show sufficient financial ability to purchase or a-quire motor vehicles to operate such interstate commerce. That plaintiff was and is now financially able to a-quire motor vehicles sufficient in number to operate such interstate commerce and is financially able to do such business.

That by reason of the said action of the said defendant, this plaintiff has not been and will not be able to comply with any other provision of Chapter 111, as amended, as defendant herein has refused to and will continue to refuse to permit the plaintiff so to do and said denial of said certificate was not based upon the rufusal of plaintiff to comply with any provision of the laws or rules and regulations of the department as plaintiff had complied as far as he has been permitted so to do by said defendant with all laws, rules and regulations. Further, this plaintiff is ready, willing and able and agrees to and will conform to and comply with all of the provisions of Chapter 111, as amended, and the rules and regulations of the Department of Public Works of the State of Washington, regulating the equipment and the operations of motor vehicles on the Public Highways as specifically set forth in the said clause of the said application as herein above set forth.

[fol. 14] 11

The plaintiff says further that if he undertakes to operate under the said certificate granted him by the State of Oregon and as required so to do on or before November 12, 1923, or forfeit the same

and lose the monies paid into the State of Oregon therefor and continues such operation on the said "Pacific Highway" into the State of Washington and deliver passengers taken on at Portland, Oregon, to Tacoma and Seattle, Washington, the defendant will immediately cause the arrest of this plaintiff and his servants, agents, employees and drivers and will cause such arrests to be made on every trip attempted to be made between said Cities of Portland, Oregon, and Tacoma and Seattle, Washington, upon the sole grounds that the plaintiff is operating such interstate commerce business without having been granted a certificate as aforesaid under Section 4 of Chapter 111, of the session laws of 1921, as amended.

12

The plaintiff says further, that the railroad fare between the Cities of Seattle, Washington and Portland, Oregon, is $6.58, and the fare by the said local stages between the said points is $6.85; the railroad fare between Tacoma, Washington and Portland, Oregon, is $5.21, and the fare by said stages between said points is $5.85, that the fare filed by plaintiff as hereinbefore set out saves the traveling public large sums of money, all of which reduces the cost on interstate commerce.

That the said action of the said Director in refusing to permit the operation in said interstate commerce directly burdens said commerce as the same is prohibited and the traveling public suffers thereby.

The plaintiff says further, that the provisions of said law, Chapter [fol. 15] 111, of the Session laws of 1921, compelling the *the* plaintiff to obtain a certificate or license to engage in interstate commerce and vesting sole jurisdiction or authority in the Director of Public Works to grant or refuse such certificate, but restricting one certificate holder in the same territory, as well as the acts of the defendant in denying the certificate or license to operate motor propelled vehicles, engaged wholly in interstate commerce, between Seattle, Washington and the southern boundary line of Washington at Vancouver, over and along the same Public Highways, which have received Federal aid as are now operated over by 4 certificate holders restricted to intrastate commerce, and to be regulated by the same laws, rules and regulations as regulate the said 4 certificate holders, take plaintiff's property without due process of law, destroy his privileges and immunities to engage in interstate commerce, not only in the State of Washington but also in the State of Oregon, have created a monopoly on Federal Aided Interstate Public Highways, have violated the contract made by the State under the provisions of which it has received Federal aid, discriminate against interstate commerce on such Public Highways in favor of Intrastate commerce, and prohibit interstate commerce to be carried on under the same laws, rules and regulations of the State of Washington as are applied to and under which intrastate business is now carried on on said Public Highways, all of which are contrary to and in

contravention of the constitution of the United States, especially the 14th Amendment thereof and article 1, section 8 thereof, the protection of which Constitution the plaintiff prays.

14

That unless this plaintiff is given protection by injunction, he, his servants, agents, employees and drivers will be arrested daily in va-
[fol. 16] rious Counties along said "Pacific Highway" and will at large expense be compelled to defend numerous suits and actions and numerous fines and imprisonment will be imposed upon him, his servants, agents, employees and drivers, and he will not be able to engage in said interstate commerce and will forfeit his rights to operate under and by virtue of the certificate issued to him by the State of Oregon, and further the Public will not be able to enjoy the decreased rate between Seattle and Tacoma, Washington and Portland, Oregon, and said through interstate service by motor vehicles and thereby this plaintiff, as well as the Public, will sustain large, heavy and irreparable loss, damage and injury, and the plaintiff has no plain, speedy and adequate remedy at law.

15

That the matters involved in this controversy exceed in value the sum of $3,000.00, exclusive of interest and costs.

16

For as much as the plaintiff can have no adequate relief except in this Court, and to the end, therefore, that the defendant may, if he can, show why the plaintiff should not have the relief herein prayed, and make full disclosure and discovery of all the matters aforesaid, according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters in this amended bill of complaint hereinbefore stated but not under oath, and answer under oath being expressly waived, the plaintiff prays that a temporary injunction be granted, restraining the defendant and all other officers and agents of the State of Washington from arresting or threatening to arrest or otherwise preventing, hindering or obstructing the plaintiff, his servants, agents, employees or drivers while engaged in operating motor
[fol. 17] propelled vehicles carrying passengers and their personal baggage for conmpensation over the Public Highways of the State of Washington, between the City of Seattle, and the Southern Boundary line of the State of Washington, at Vancouver, Washington, and intermediate points, no passenger taken on in the State of Washington to be discharged within such State, all business transacted to be restricted to interstate commerce, upon the ground and for the reason that the plaintiff has not obtained the certificate as provided for in said law Chapter 111, as amended, and said injunction order not to protect the said plaintiff, agents, servants, employees and

drivers against the violation of the provisions of other laws of said State relating to and regulating motor propelled vehicles and their owners or operators nor any of the provisions of said law Chapter 111, as amended, except the said provisions regarding obtaining a certificate to operate the business of auto transportation; that as the constitutionality of a State Statute and the enforcement thereof by the defendant, the officer vested with proper authority, is sought to be enjoined, the plaintiff prays that the Court proceed to call in two other Judges of this Court, one of whom to be a Circuit Judge, for the purpose of hearing and determining the application for the temporary injunction as prayed for herein, and that pending the hearing and determination of said application for such temporary injunction, the Court will issue a temporary restraining order, restraining the defendant and all other officers and agents of the State of Washington from arresting or threatening the arrest or otherwise preventing, hindering or obstructing the plaintiff, his servants, agents, employees or drivers while engaged in operating motor propelled vehicles carrying passengers and their personal baggage for compensation over the Public Highways of the State of Washington between the City of Seattle and the southern boundary [fol. 18] line of the State of Washington, at Vancouver, Washington, and intermediate points, no passenger taken on in the State of Washington to be discharged within such State, all business transacted to be restricted to interstate commerce, upon the ground and for the reason that the plaintiff has not obtained the certificate as provided for in said law Chapter 111, as amended, and said injunction order not to protect the said plaintiff, agents, servants, employees and drivers against the violation of the provisions of other laws of said State relating to and regulating motor propelled vehicles and their owners or operators nor any of the provisions of said law Chapter 111, as amended, except the said provisions regarding obtaining a certificate to operate the bus of auto transportation; and that upon the final hearing of this suit, the provisions of said law, Chapter 111, of the Session laws of 1921, as amended, relating to and compelling the obtain- of a certificate in order to operate motor propelled vehicles engaged in interstate commerce be declared void and unconstitutional and that such temporary injunction be made permanent, and plaintiff prays for such other, further and proper relief as may be just and equitable in the premises.

W. R. Crawford, Solicitor for Plaintiff.

[fol. 19] Jurat showing the foregoing was duly sworn to by A. J. Buck omitted in printing.

[File endorsement omitted.]

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed January 15, 1924

Comes now the defendant and moves the Court to dismiss the amended bill of complaint filed herein, for the reason and upon the ground that, as appears upon the face thereof,

I

Said amended bill of complaint does not state any matters of equity entitling the plaintiff to the relief prayed for.

II

Said amended bill of complaint does not state facts sufficient to entitle plaintiff any relief against this defendant.

III

Wherefore, defendant prays the judgment of this Court whether he shall further answer, and that he be dismissed with his costs.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General; E. W. Anderson, Assistant Attorney General, Solicitors for Defendant.

[File endorsement omitted.]

[fol. 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUSTAINING MOTION TO DISMISS AMENDED BILL OF COMPLAINT—Filed January 28, 1924

This cause coming on regularly to be heard on the 21st day of January, 1924, upon the defendant's motion to dismiss the amended bill of complaint filed herein, plaintiff being represented by W. R. Crawford, his counsel, and defendant being represented by John H. Dunbar, attorney general; Raymond W. Clifford, assistant attorney general, E. W. Anderson, assistant attorney general, and H. C. Brodie, of counsel, and the Court being fully advised in the premises, it is hereby

Ordered, adjudged and decreed that the said motion be and it is hereby granted and that said amended bill of complaint be and the same is hereby dismissed.

To the foregoing the plaintiff excepts and his exception is allowed.
Done in open Court this 28th day of January, 1924, as of the 21st day of Jan., 1924.

Jeremiah Neterer, Judge.

O. K. as to form. W. R. Crawford, Counsel for Plaintiff.

[File endorsement omitted.]

[fol. 22] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING COMPLAINT—Filed January 21, 1924

This cause coming on to be heard on the motion of E. V. Kuykendall, Director of Public Works of the State of Washington, Defendant, to dismiss said cause for want of equity and because the said complaint does not state a good cause of action, and after plaintiff had announced in open Court that he would stand on said complaint and the Court having heard arguments of counsel and being fully advised in the premises,

It is ordered, adjudged and decreed that the said above-entitled cause be and the same is hereby dismissed.

To all of which the plaintiff excepts and such exceptions are hereby allowed.

Enter:

Jeremiah Neterer, Judge.

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FIXING APPEAL BOND—Filed January 21, 1924

This cause coming on to be heard upon the application of A. J. Buck, plaintiff in the above-entitled cause, for the fixing of the amount of bond on appeal to the Supreme Court of the United States and the plaintiff having given notice of appeal in open Court and the Court having heard the suggestions of the respective counsel of the parties hereto and being fully advised in the premises,

It is ordered, adjudged and decreed that the amount of such appeal bond be and it is hereby fixed at ($500.00) Five Hundred Dollars, and further,

It is ordered, adjudged and decreed that said appeal prayed for by the plaintiff be and is hereby allowed upon the filing of a proper bond conditioned as provided for by law in the said sum of Five Hundred Dollars ($500.00) and approved by the Court.

Enter:

Jeremiah Neterer, Judge.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed February 20, 1924

And now, on this 20th day of February A. D. 1924, came the plaintiff by his solicitor, W. R. Crawford, and says that the decree entered in the above cause on the 21st day of January A. D. 1924 is erroneous and unjust to plaintiff.

First. Because the Court erred in dismissing the amended bill of complaint.

Second. Because the Court erred in dismissing the cause upon refusal of the plaintiff to further plead after the amended complaint had been dismissed.

Wherefore the plaintiff prays that the said decree be reversed and the District Court be instructed to enter such decree as prayed for by said bill of complaint or for such relief as the plaintiff is entitled to and as the nature of the cause demands.

W. R. Crawford, Solicitor for Plaintiff.

[File endorsement omitted.]

[fol. 25] APPEAL BOND FOR $500—Approved and filed February 23, 1924; omitted in printing

[fol. 26] [File endorsement omitted.]

[fol. 27] [Title omitted]

NOTICE—Filed February 23, 1924

To John H. Dunbar, attorney general; Raymond W. Clifford, assistant attorney general; E. W. Anderson, assistant attorney general, solicitors for appellee:

Please take notice that on the 23 day of February the undersigned filed with the Clerk of this Court a Præcipe for the record to be transmitted to the Supreme Court of the United States on the appeal taken in the above cause, a copy of which Præcipe is herewith served on you.

Dated this 23 day of February, 1924.

W. R. Crawford, Solicitor for Appellant.

Service of the within notice and copy of Præcipe is hereby accepted this 23 day of February, 1924.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General; H. C. Brodie, Assistant Attorney General, Solicitors for Appellee.

[fol. 28] [File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

PRÆCIPE—Filed February 23, 1924

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above-entitled case for the use of the Supreme Court of the United States by including the following:

1. The amended bill of complaint.
2. The motion to dismiss the amended complaint.
3. Order dismissing the amended complaint.
4. Order dismissing cause, on refusal to plead further.
5. Order granting appeal and fixing amount of appeal bond.
6. Assignment of errors.
7. Appeal bond.
8. Præcipe.

8½. Notice of filing of Præcipe.

9. Certificate of Clerk.

N. B.—Omit all captions on instruments, pleadings and orders.

Dated this 23rd day of February, 1924.

W. R. Crawford, Solicitor for Appellant.

[File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT

APPELLEE'S PRÆCIPE FOR ADDITIONAL RECORD—Filed March 1, 1924

To the clerk of the above-entitled court:

Please make and certify on appeal to the Supreme Court of the United tSates, the following additional portions of the record which appellee requests to be printed, to-wit:

1. Original bill of complaint.

2. Decision of the three judges filed December 7, 1923, denying interlocutory injunction.

3. Motion to dismiss for lack of jurisdiction by reason of non-joinder of indispensable and necessary parties.

4. Decision of three-judge court filed January 7, 1924, denying interlocutory injunction on amended complaint.

5. Order denying motion to dismiss on account of want of jurisdiction.

6. This præcipe with affidavit of service thereof.

Dated this 29th day of February, 1924.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General; H. C. Brodie, Assistant Attorney General, Solicitors for Appellee.

[fol. 31] Affidavit of service omitted.

[File endorsement omitted.]

[fol. 32] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

No. 189-E. In Equity

A. J. BUCK, Plaintiff,

vs.

E. V. KUYKENDALL, Director of Public Works of the State of Washington, Defendant.

COMPLAINT—Filed Octo'er 31, 1923

To the Honorable Judge of the District Court of the United States for the Western District of Washington, Southern Division, sitting in equity:

A. J. Buck brings this his bill of complaint against E. V. Kuykendall, Director of Public Works of the State of Washington, defendant; and thereupon plaintiff complains of the defendant and shows unto Your Honor as follows:

I

That A. J. Buck, plaintiff, is a citizen of the Sate of Washington, residing at Tacoma.

II

That E. V. Kuykendall, defendant, is now and has been since the spring of the year 1921 the duly appointed, qualified and acting Director of Public Works of the State of Washington, and is a citizen of such State, residing at Olympia.

III

That Congress duly enacted on July 11, 1916, an act entitled:

"An act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes."

[fol. 33] That according to the provisions of said act the Federal Government agreed to furnish moneys to States for the purpose of adding in the building of post roads, provided any State desiring such aid would first pass necessary legislation adopting the provisions of said Federal Act. That thereafter the legislature of Washington did duly enact a certain law, entitled:

"An act relating to public highways, rural post roads, assenting to the provisions of an act of Congress entitled 'An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' approved July 11, 1916; authorizing and directing the state highway commissioner, the state highway board and the state treasurer to perform certain duties in connection therewith; providing for the apportionment of certain funds therefor; and declaring an emergency;"

being Chapter 76 of the Session Laws of 1917. That such law is herein referred to and made a part hereof the same as if set out in full. Such law went into force and effect immediately upon passage and is now in full force and effect. That by the provisions of said law the State of Washington adopted all the terms and conditions contained in said Federal Act and agreed to abide thereby.

That thereafter Congress duly enacted an act entitled:

"An Act to amend the Act entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11, 1916, as amended and supplemented, and for other purposes;"

which act was passed on November 9, 1921, and which is now in full force and effect. That both of said Federal Acts above set forth provided that all roads receiving any part of the appropriations to be made by the Federal Government should be free of tolls of all kinds. That according to the provisions of said Federal Acts and the State Act hereinbefore set forth, full plans for future construction and reconstruction were presented by the State of Washington

to the Federal Government and adopted by it, including the construction and reconstruction of the "Pacific Highway" extending [fol. 34] from Seattle, Washington, to the boundary line of the State of Oregon at Vancouver, Washington. That the Federal Government, under the provisions of said acts, has paid over to the State of Washington large sums of money which have been received by said State and, as the plaintiff is informed, believes and so charges the fact to be, an amount of money equal to one-quarter of the entire cost of the construction and reconstruction of said strip of said "Pacific Highway" between said above mentioned points. That all of the said portions of said "Pacific Highway," as aforesaid, are under the protection of the said Federal Acts by reason of the said contract made by the State of Washington by the act of its legislature in the year 1917, and thereby this plaintiff has been vested with the right to use such Highway as a thoroughfare. That under the same provision of the same Federal Acts the State of Oregon, having adopted the same by proper act of legislature, has also received a large percentage of the entire cost of construction and reconstruction of the said "Pacific Highway" from the Oregon line opposite Vancouver, Washington, to Portland, Oregon.

IV

That the Washington legislature duly enacted a law entitled:

"An Act relating to the use of the public highways and the rights and remedies of persons thereon, providing for the licensing of motor vehicles and collecting, distribution and expenditure of fees therefor, fixing penalties for violations thereof, and repealing Chapter 153 of the Laws of 1913 and Chapter 142 of the Laws of 1915;"

being Chapter 96 of the Session Laws of 1921, and thereafter amended some of the sections thereof by a law duly enacted, entitled:

"An Act relating to the use of the public highways and the rights [fol. 35] and remedies of persons thereon, and amending Sections 6313, 6328, 6330, 6332, 6335, 6339, 6340, 6355 and 6358 of Remington's Compiled Statutes, adding thereto a new section to be known as Section 6358-1 and declaring that this act shall take effect immediately;"

being Chapter 181 of the Session Laws of 1923. Such law, as amended, is now in full force and effect. That such law, as amended, contains full, complete and comprehensive rules and regulations for the operation of motor vehicles of all classes on the public highways of the State, including the requirement of license fees to be paid on each motor vehicle using said highways; and further providing penalities for failure to obey each and every of the provisions thereof. That such law, amended, is hereby referred to and made a part hereof as if set out in full. That this plaintiff

has complied with each and every provision of said law, and is ready, willing and able at all times to comply therewith.

V

That the Washington legislature duly enacted a law entitled:

"An act relating to the operation of vehicles and the use of public highways, providing for the licensing of persons operating motor vehicles, providing for the enforcement thereof and all other highway and motor vehicle laws and prescribing penalties for violations thereof; and making appropriations;"

being Chapter 108 of the Session Laws of 1921, which law was thereafter amended in part by a law duly enacted, entitled:

"An act relating to the operation of vehicles and the use of public highways, providing for the licensing of persons operating motor vehicles, providing for the enforcement thereof and all other highway and motor vehicle laws and prescribing penalties for violation thereof; and amending Section 234—22 of Pierce's Code, and adding a new section;"

[fol. 36] being Chapter 122 of the Session Laws of 1923. Such law, as amended, is now in full force and effect. That such law, as amended, provides for each operator of a motor vehicle to procure a license to drive the same, paying a fee therefor. That this plaintiff and his drivers have complied with all the provisions of said law as amended and are ready, willing and able at all times to comply therewith. That such law as amended is hereby referred to and made a part hereof as if set out in full.

That the above laws, as amended, to-wit, Chapter 96 of the Session Laws of 1921 and Chapter 108 of the Session Laws of 1921, are the only laws now in full force and effect enacted by the State of Washington relating to the operation of motor propelled vehicles on the public highways of said State, except the law hereafter referred to, being chapter 111 of the Session Laws of 1921, as amended.

VI

That the legislature of Washington duly enacted a law, entitled:

"An act providing for the additional supervision and regulation of the transportation of persons, and property for compensation over any public highway by motor propelled vehicle: Defining transportation companies and providing for additional supervision and regulation thereof by the public service commission, providing for the enforcement of the provisions of this act and for the punishment of the violations thereof;"

being Chapter 111 of the Session Laws of 1921, and thereafter Section 9 of said law was duly amended by a law, entitled:

"An act to relieve the general fund of the expense of regulating and supervising auto transportation companies, creating a fund and providing fees to cover the cost of such regulation and supervision, an amending Section 9 of Chapter 111 of the Laws of 1921, and making an appropriation;"

[fol. 37] being Chapter 79 of the Session Laws of 1921. That said law went into full force and effect in June, 1921, and as now amended is in full force and effect. Such law, as amended, is hereby referred to and made a part hereof as if set out in full. That by the provisions of said law, as amended, the defendant, as Director of Public Works, is vested with sole and exclusive authority, and it is made his duty, to enforce the provisions of said law, as amended, and to cause the institution of actions, both civil and criminal, against persons or corporations for any alleged violations thereof. Further said defendant is vested with sole authority to grant or refuse a license to any person or corporation to operate on the public highways of the State who come within the definition of auto transportation as set out in said law. Such law also provides that no license can be so granted by said defendant to operate in the same territory occupied by another certificate holder unless the latter fails, refuses or declines to obey the proper orders of said dewendant, and then only after a proper hearing. Such law, as amended, vests said defendant with the sole jurisdiction and authority to control, supervise and regulate said auto transportation companies in all matters, including making, altering or changing the rates of fare or time schedules. Such law, as amended, also provides that surety bonds or liability insurance must be carried on each motor vehicle operated, the premium for each policy — vary from $200 a year to over $400 a year, depending on the carrying capacity of the vehicle bonded or insured. The said law, as amended, provides that a violation of any provision thereof or the failure to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement made by the defendant shall constitute a gross misdemeanor and punishable as such, being either a fine or imprisonment or both.

[fol. 38] VII

That under the provisions of said law, Chapter 111 of the Session Laws of 1921, as amended, the defendant has granted and has issued to the Park Auto Transportation Company a certificate to operate between the cities of Seattle and Tacoma, on the said "Pacific Highway," and the said grantee is now operating between said two cities and is carrying passengers between said two cities and intermediate points; that another certificate under said law has been issued to the Thompson-Smith Company to operate between the cities of Tacoma and Olympia, on said "Pacific Highway," carrying passengers between said points and intermediate points; a certificate also has been issued under said law to the Northwestern Transportation Company to operate between the cities of Olympia and Kelso, on the said "Pacific Highway," carrying passengers between said points and in-

termediate points; and further, a certificate has been issued under said law to the Camas Stage Company, a Washington corporation, to operate between Kelso, Washington, and Portland, Oregon, over the said "Pacific Highway," carrying passengers between said points and intermediate points. That each one of said companies so operating as above stated has no authority to operate except between said points on said highway as named in its certificate. That the said defendant, although petitioned so to do, has never issued and has refused to issue any certificate under the provisions of said law of 1921, as amended, to any person or corporation for the purpose of carrying through passengers on said "Pacific Highway" between Seattle or Tacoma and the boundary line of the States of Washington and Oregon, and that there is not now any certificate holder entitled to operate a through service on said "Pacific Highway" from Seattle or Tacoma either to the southern boundary line of the State of Washington or to Portland, Oregon. That there is not now any through [fol. 39] line whatever operated between said cities of Seattle or Tacoma, Washington, and Portland, Oregon, carrying through passengers by motor vehicle stages between said points on said "Pacific Highway" or any other highway. Further, that said above named companies by virtue of the certificates granted to them under the provisions of said law are using said parts of said "Pacific Highway" as places of business, taking on and discharging passengers along and on said highway. That such operation on said "Pacific Highway" is not an obstruction to or an interference with the use of said "Pacific Highway" by other operators of motor vehicles.

VIII

That in July, 1923, the defendant did refuse and decline to grant to this plaintiff a certificate which had been duly applied for, under the provisions of the said law, as amended, being Chapter 111 of the Session Laws of 1921, and Chapter 79 of the Session Laws of 1923, to operate motor vehicles between Seattle, Washington, and the south boundary line of the State at Vancouver, Washington, as part of a through line to Portland, Oregon, carrying passengers between Seattle and Tacoma, Washington, and Portland, Oregon, but not carrying passengers locally in the State of Washington. The business desired and to be carried on being wholly interstate. That the plaintiff did not contemplate to and will not use the said "Pacific Highway," or any part thereof, for doing business along or on the same, but did contemplate to and will take on or discharge passengers on private property therefor and only use said "Pacific Highway" as a thoroughfare and for interstate commerce and in the same manner as any motor vehicle. Rights on private properties at Seattle and Tacoma to load and unload passengers have been acquired by the plaintiff. That the use of said "Pacific Highway" by plaintiff as aforesaid would not obstruct nor interfere with the use of said highway by other motor vehicles, and no stops would be made thereon to take on or discharge any passengers.

[fol. 40] IX

That this plaintiff has been engaged for many years last past in the business of transporting passengers by motor stage in the State of Washington, and has made a careful examination into the needs of through transportation by motor stage between the said cities of Seattle and Tacoma, Washington, and Portland, Oregon, and found that there was operated between said cities aforesaid during a period of many months in the year 1922, up to some time in December, 1922, a daily service between the cities of Seattle and Tacoma and Portland by motor stages, and there was a large and growing demand for such character of through service between said cities and states. That he has personally interviewed more than one thousand persons in the cities of Seattle and Tacoma and adjacent territory and has found that such a service would be immediately patronized and would furnish to the public a means of transportation by through stages between said cities in Washington and Oregon that is not now furnished. That any person now desiring to travel by motor stage between said cities of Seattle, Washington, and Portland, Oregon, would be obliged to change stages at Tacoma, Olympia and Kelso, as no through service whatsoever is now given or has been given since the discontinuance of the through service in December, 1922, which service was only discontinued by reason of the threats of the defendant herein to cause the arrest of the then operator of such line, and its agents, servants, employees and drivers, and for no other reason whatsoever, as the operation of said through line was profitable. Further, that the charges for the through transportation established by this plaintiff between the City of Seattle, Washington, and Portland, Oregon, are fixed at $5.60 and that the present aggregate rate of fare between said points by the said separate stage lines set out hereinabove amounts to $6.85, and the fare established by plaintiff between the cities of Tacoma, Washington, [fol. 41] and Portland, Oregon, is $4.60, while the fare now charged for the said trip between said points, with the said changes of vehicles as hereinbefore set forth, is $5.85. That the fare by railroad between said City of Seattle and Portland, Oregon, is $5.68, and between Tacoma, Washington, and Portland, Oregon, is $5.21.

X

That the plaintiff herein is the owner of a certificate issued by the State of Oregon entitling him to operate motor propelled vehicles carrying passengers on the "Pacific Highway" between the City of Portland and the northern boundary line of the State of Oregon, and by the terms of such certificate the plaintiff is entitled to and desires to commence the said operation in said State as a continuous line between the said cities of Portland, Oregon, and Tacoma and Seattle, Washington, but not to engage in any intrastate business whatever in said States. That the said certificate was so granted by the Railroad Commission of the said State of Oregon under the provisions of the

law of Oregon which was enacted by the State of Oregon in the year 1921, being entitled:

"An act providing for the supervision and regulation of the transportation of persons and property for compensation over any public highway by motor vehicles, motor trucks, motor busses, bus trailers, semitrailers and other motor trailers used in connection therewith, and by other motor vehicles; defining what constitutes transportation for compensation, defining transportation companies, and providing for the supervision and regulation thereof by the public service commission of Oregon; providing for the enforcement of the provisions of this act and for the punishment of violations thereof, and declaring an emergency;"

being Chapter 10 of the Special Session Laws of 1921 as amended by Chapter 205, General Laws of Oregon of 1923; that such law is now in full force and effect. Such law is hereby referred to and made a part hereof as if the same was set out in full.

[fol. 42]

XI

The plaintiff says further if he undertakes to operate motor vehicles on said "Pacific Highway" between Seattle and Tacoma, Washington, and Portland, Oregon, taking on and discharging interstate, through passengers only on private property in the State of Washington and using said highway as a thoroughfare to engage in said interstate commerce, the defendant will immediately cause the arrest of this plaintiff and his servants, agents, employees and drivers and will continue to cause such arrests to be made, daily charging violations of said law, Chapter 111 of the Session Laws of 1921, as amended. That the plaintiff is obliged to commence his operations in the State of Oregon under the certificate on or before November 12th, 1923, or forfeit the same. That the said defendant has granted certificates on said "Pacific Highway" for the operation in and out of the cities of Seattle and Tacoma of equipment which carry from 25 to 30 people and that said equipment so used thereon is heavier and larger in every respect than the equipment to be used by this plaintiff on said highway.

XII

The plaintiff says further that the said law, Chapter 111 of the Session Laws of 1921, as amended by Chapter 122 of the Session Laws of 1923, is unconstitutional and void, being in contravention of the Constitution of the United States, the protection of which is invoked by this plaintiff, especially the Fourteenth Amendment thereof and the Commerce Clause, Article 1, Section 8; all the said acts and threatened acts of the defendant are illegal and unlawful, having been performed and threatened to be performed under the provisions of said void and unconstitutional law as aforesaid; that such acts of said defendant, as well as said law, have established and will continue to protect, a monopoly in interstate commerce on said

[fol. 43] "Pacific Highway" by motor vehicles between said cities of Seattle and Tacoma, Washington, and Portland, Oregon.

XIII

That unless this plaintiff is given protection by injunction, he, his servants, agents, employees and drivers, will be arrested daily in various counties along said "Pacific Highway" and will have to defend numerous suits and actions, and numerous fines and imprisonments will be imposed upon him, his agents, servants, employees and drivers, and he will be unable to engage in said interstate commerce and will forfeit his rights to operate under and by virtue of the certificate issued to him by the State of Oregon, and further the public will not be able to enjoy the right and privilege of a through interstate service by motor vehicles between Seattle and Tacoma, Washington, and Portland, Oregon, and thereby this plaintiff will sustain large, heavy and irreparable loss, damage and injury, and the plaintiff has no plain, speedy and adequate remedy at law.

XIV

That the matters involved in this controversy exceed in value the sum of $3,000 exclusive of interest and costs.

XV

For as such as the plaintiff can have no adequate relief except in this court, and to the end, therefore, that the defendant may, if he can, show why the plaintiff should not have the relief herein prayed, and make full disclosure and discovery of all the matters aforesaid, according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct and perfect answer make to the matters in this bill of complaint hereinbefore stated, but not under oath, an answer under oath being expressly waived, the plaintiff prays that a temporary injunction be granted, restraining the [fol. 44] defendant and all other officers and agents of the State of Washington from in any way and in any wise, enforcing the said law, Chapter 111 of the Session Laws of 1921, as amended, by Chapter 79 of the Session Laws of 1923, against this plaintiff, his agents, servants, employees and drivers while engaging in and carrying on the business of transporting passengers and their personal baggage by motor vehicles into or out of the State of Washington; that as the constitutionality of a state statute and the enforcement thereof by the defendant, an officer, is sought to be enjoined, the plaintiff prays that the court proceed to call in two other judges of this court, one of whom to be a Circuit Judge, for the purpose of hearing and determining the application herein prayed, for a temporary injunction, and that pending the hearing and determination of such application for a temporary injunction, the court will issue a temporary restraining order restraining and enjoining the said defendant, and all other officers and agents of the State of Wash-

ington, from in any way and in any wise, enforcing the said law, as amended, against the plaintiff, his agents, servants, employees and drivers, while engaged in and carrying on said interstate commerce; and that upon the final hearing of this suit, the said law, Chapter 111 of the Session Laws of 1921, as amended, be declared unconstitutional and void insofar as the same applies to interstate commerce, and that such temporary injunction be made permanent, and plaintiff prays for such other, further and proper relief as may be just and equitable in the premises.

W. R. Crawford, Attorney for Plaintiff.

[fol. 45] Jurat showing the foregoing was duly sworn to by A. J. Buck omitted in printing.

[File endorsement omitted.]

[fol. 46] IN THE UNITED STATES DISTRICT COURT

In Equity. No. 189

[Title omitted]

DECISION—Filed December 7, 1923

The plaintiff, a citizen of the State of Washington, seeks to restrain the defendant, Director of Public Works of the State of Washington, from interfering with his operation of a line of motor vehicles between Portland, Oregon, and Seattle, Washington, travel wholly interstate. He alleges that the Act of Congress of July 11, 1916, as amended November 9, 1921, extending aid to states in the construction of rural post roads and the acceptance of such aid by the legislature of the state, vested in the plaintiff the right to use such highway as a thoroughfare; that he has obtained from the state of Oregon permission to operate a line from Portland to the Washington-Oregon state line at Vancouver; that he has applied to the defendant as Director of Public Works of the state for a certificate of necessity and permission to operate his automobile bus line over the public highways of the State of Washington. . Such certificate of necessity, and permission to operate said line, have been denied. The plaintiff further alleges that the defendant has granted certificates to operate to other transportation companies, one from Seattle to Tacoma on the Pacific Highway, another from Tacoma to Olympia on said Pacific Highway, and another from Olympia to Kelso on said Pacific Highway, and that a certificate has been issued in Oregon to the Camas Stage Company, a Washington corporation, to operate between Kelso, Washington, and Portland, Oregon, over the Pacific Highway; that there is no permission granted to operate a through passenger line from Portland to Seattle over said Pacific Highway; that the business is wholly interstate; that the plaintiff expects to use

private terminals at Portland and Seattle and does not expect to use the Pacific Highway, a public thoroughfare, for the taking-on or discharging of passengers. He also states that the fare he expects to charge is $5.60 one way; that the present fare over the separate lines which are now operating is $6.85, and alleges that the Act approved March 17, 1921, Chapter 111, Session Laws 1921, page 338, "An act providing for additional supervision and regulation of the transportation of persons and freight for compensation over any public highway by motor propelled vehicle * * *, is unconstitutional; it contravenes the 14th amendment to the Constitution and the commerce clause, Art 1, Sec. 8, and that such act of the defendant has created and will continue to create a monopoly in [fol. 47] interstate commerce upon said Pacific Highway in the operation of motor vehicles between the cities of Seattle and Tacoma, Washington, and Portland, Oregon. Plaintiff states that he has complied with all other motor vehicle laws and regulations of the state.

The question before the court is whether or not the interlocutory injunction shall issue.

W. R. Crawford, Solicitor for Plaintiff.

John H. Dunbar, Attorney General of the State of Washington; Raymond W. Clifford, Assistant Attorney General; E. W. Anderson, Assistant Attorney General, Solicitors for Defendant.

Before Gilbert, Circuit Judge, and Cushman and Neterer, District Judges

NETERER, District Judge:

A like issue was presented to this court, as it is now constituted, in Interstate Motor Transit Co. v. Kuykendall, 284 Fed. 882. But for the earnestness manifested by counsel for the plaintiff, who was also attorney for the plaintiff in the named case, we would rest this issue upon what was there said.

It is asserted that the Act of July 11, 1916, supra, gave to the plaintiff a vested right to use this highway by reason of the contribution to the construction thereof by the United States and the declaration by Congress that the highway is a "post road." Section 2 of the act, supra, says, "That for the purposes of this act the term 'rural roads' shall be construed to mean any public road over which the United States mails now are or may be hereafter transported, excluding every street and road in a place having a population, as shown by the latest available census, of 2,500 or more, except that portion of such street or road along which the homes average more than two hundred feet apart."

[fol. 48] The court judicially knows that Seattle, Tacoma, Olympia, Chehalis, Centralia, and Vancouver are upon the route sought by the plaintiff, and each contains a population in excess of twenty-five hundred. By no stretch of the imagination could the plaintiff, by virtue of the provisions of the Act of 1916, supra, assert any interest

in the excepted roads and streets, and his assertion of vested right in any portion of the highway is absolutely baseless.

The Act of Nov. 9, 1921, 42 Stat. 212, amending Act of July 11, 1916, supra, explains the general scheme of road construction and provides for cooperative construction and reconstruction of certain systems of highways within the state, the projects upon which expenditures shall be made to be approved by the Secretary of Agriculture in such a manner as will expedite the completion of an adequate system of highways interstate in character. The state shall designate a system not to exceed seven per cent of its total highway mileage which shall receive federal aid, which are to be divided into primary or interstate highways and secondary or intercounty highways. That before any project shall be approved by the Secretary of Agriculture such states shall make provision for said funds required each year of such state for the construction, reconstruction and maintenance of all federal aid highways within the state, the funds to be under the direct control of the state highway department; and the duty is imposed upon the state to maintain the highways. Section 18, Act of Nov. 9, 1921, supra, provides:

"That the Secretary of Agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this act, including such recommendations to the Congress and to the State Highway Department as may be deemed necessary for preserving and protecting the highways and insuring the safety of traffic thereon."

The Congress has not legislated with relation to the use of high-[fol. 49] ways, to the construction of which the United States contributed, other than as provided by Section 18, supra, and if recommendations have been made by the Secretary of Agriculture to the State Highway Department, the presumption is that such recommendations have been carried out, nothing appearing to the contrary.

It is asserted that the provisions of the Act of March 17, 1921, supra, are inoperative as to plaintiff. In Dent v. Oregon City, 211 Pac. 909 (106 Ore. 122), the court said:

"The right to use the public highways of the state by the ordinary and usual means of transportation is common to all members of the public without distinction, and extends to those engaged in the business of carrying passengers or freight for hire by such ordinary and usual means of transportation, as well as to individuals pursuing a strictly private business, subject to the power of the state, by legislative enactment, to impose reasonable and impartial regulations upon such use, which power may be delegated by the Legislature to the governing bodies of municipal corporations."

The Oregon court cites Jitney Bus Assn. v. Wilkes-Barre, 253 Pa. 462, where the court said "Regulation is not to be carried to the extent of prohibition." The Supreme Court of Washington, in Hadfield v. Lundin, 98 Wash. 657, said:

"The streets and highways belong to the public; they are built and maintained at the public expense, for the use of the general public in the ordinary and customary manner. The state, and the city as an arm of the state, has absolute control of the streets in the interest of the public. No private individual or corporation has a right to the use of the streets in the prosecution of the business of a common carrier for private gain, without the consent of the state, nor except upon the terms and conditions prescribed by the state or municipality as the case may be."

In State v. Seattle Taxicab & Transfer Company, 90 Wash. 416, the court said:

"Highways are constructed primarily as a convenient passage way for all the people, and no one has an absolute right to use them for his own profit and gain, even though such use be to carry over them people who desire the service."

In Allen v. Bellingham, 95 Wash. 12:

"But the use to which the plaintiff proposes putting the streets is not the ordinary or customary use, but a special one. He purposes using them for the transportation of passengers for hire, a use for which they are not primarily constructed."

[fol. 50] In state ex rel. Shafer v. Spokane, 109 Wash. 360, and Northern Pac. Ry. Co. v. Schoenfeldt, 23 Wash. Dec., Feb. 23, 1923, the Supreme Court of Washington reaffirmed what it said in the cases cited.

To the extent of the State of Washington's intra-state control of its highways by legislative act, as construed by its highest court, this court is bound, no constitutional right intervening.

The state has full power to regulate extraordinary use of its streets and highways by common carriers. Interstate Motor Transit Co. v. Kuykendall, supra; Northern Pac. Ry. Co. v. Schoenfeldt, 23 Wash. Dec., Feb. 28, 1923, Davis v. Mass, 167 U. S. 43. Public highways are subject to the police powers of the state. Hendrick v. Maryland, 235 U. S. 611. A state by legislative act may, under the police power, perform the double function of reasonable regulation of business and raising revenue by a privilege or license fee,—Bradley v. City of Richmond, 227 U. S. 477. Camas Stage Co. v. Kozer, 209 Pac. 95. Kane v. New Jersey, 242 U. S. 160—and is subject to no limitations save those of the due process and equal protection clauses of the fourteenth Amendment. Gundling v. Chicago, 177 U. S. 183. The exercise of the police power is a continuing right and may meet the ever changing conditions and necessities of the public. Lane v. Whitaker, 275 Fed. 476; Schoenfeldt v. City of Seattle, 265 Fed. 726. McGlothern et al. v. Seattle, 116 Wash. 331. The state legislature has a right to delegate to the Department of Public Works the right to determine to what use the highways shall be applied, subject to review by the courts. Davis v. Mass, 167 U. S. 43. Wilson v. Eureka City, 173 U. S. 32. Ex parte Kollock, 165 U. S. 526. Brad-

ley v. City of Richmond, supra. Sec. 18, Act of Nov. 9, 1921, supra. Dent v. Oregon City, supra.

The objection to the Act of March 17, 1921, supra, because of [fol. 51] requirements for the safety of passengers, is answered by the Supreme Court in the Second Employers' Liability cases, Mondou v. N. Y., N. H. and H. R. Co., 223 U. S. 50, where the court held that any measure which would impel the carrier to avoid or prevent negligent acts would be a proper regulation of commerce.

"Safety of traffic" (Act Nov. 9, 1921 supra) must be determined by capacity of the highway, amount of travel, skill of driver, responsibility of operator, and demands to use the highway for ordinary uses as distinguished from extraordinary uses, such as a carrier for hire.

The Supreme Court of Rhode Island in Gizzarelli v. Presbury, 117 Atl. 359, said:

"Authority to use the public highway as a common carrier of passengers for hire is not a right belonging to the individual, but is in the nature of a privilege. * * * Due consideration for the safety of the public requires that a careful selection should be made of the individuals to whom authority is given to use the public highways as carriers of passengers for hire."

The state may not under the guise of regulations arbitrarily prohibit the use of the highway to the plaintiff. Such issue, however, is not before the court, as the plaintiff has not complied with any provisions of the challenged act and at bar announced that he did not propose to comply with the provisions of the act, for the reason that he had a right paramount to its provisions. When the plaintiff disposes himself in harmony with the reasonable provisions of the act and is denied permission to operate, the courts are open to grant such relief as may be warranted by the law and facts. Interstate Motor Transit Co. v. Kuykendall, supra. Vandalia R. R. v. Public Service Com. 242 U. S. 255.

We might rest the decision here, but in view of the argument will say that while the Act of June 8, 1872, Sec. 7456 C. S., provides that all waters, canals, roads, etc., over which mail is carried and letter carrier routes established in a city or town, and all railroads in operation, are declared "post roads," yet such fact does not deprive the state of the police power thereof. In Commonwealth v. Closson, 118 N. E. 653 (Mass.) a mail carrier failed to comply [fol. 52] with municipal regulations and was arrested. The court said:

"While undoubtedly they are post roads under Act Cong. March 1, 1884, C. O., enacting that 'all public roads and highways while kept up and maintained as such are hereby declared to be post routes' (U. S. Comp. St. 1916, Sec. 7457) and whoever knowingly and willfully obstructs or retards (the passage of the mail, or any carriage, * * * driver, or carrier * * *' is upon conviction subject to fine or imprisonment, or both, by U. S. Rev. Sts.

Sec. 3995, Act of March 4, 1909, c. 321, Sec. 201, 35 Stat. 1127 (Comp. St. 1916, Sec. 10371, yet the ways remain public ways laid out and maintained by the commonwealth, which has the exclusive power not only of alteration and of discontinuance, but to make and enforce reasonable regulations for their use. Nor do the facilities thereby afforded for transportation of the mails confer extraordinary rights upon mail carriers to use the ways as they please, or necessarily or impliedly do away with the power of supervision and control inherent in the state. Commonwealth v. Breakwater Co., 214 Mass. 10, 100 N. E. 1034, Postal Telegraph Cable Co. v. Chicopee, 207 Mass. 341, 350, 93 N. E. 927, L. R. A. (N. S.) 997; Dickey v. Turnpike Co., 7 Dana (Ky.) 113; Searight v. Stokes, 3 How. 151, 11 L. Ed. 537; Price v. Pennsylvania R. R., 113 U. S. 221, 5 Sup. Ct. 427, 28 L. Ed., 980; St. Louis v. Western Union Telegraph Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; Martin v. Pittsburg & Lake Erie R. R., 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed. 184, 8 Ann. Cas. 87."

As was said in Interstate Motor Transit Co. v. Kuykendall, supra, the act challenged does not seek to regulate interstate commerce. It expressly disclaims such purpose. It seeks to regulate operation over the public highway for which the state is spending many millions of dollars for construction and maintenance. If one concern can establish a terminal across the state line and operate over the highways in this state without regulation, it is reasonable to presume that others will do likewise, and added confusion would arise which would be foreign to the intended ordinary use of such highways and to the concluding thought of Section 18, Act of November 9, 1921, supra, "To insure the safety of public travel," the burden of which rests upon the state, and might jeopardize life, limb and property of the private citizen of the state attempting to use the highway. Citizens of the state have a right to the enjoyment of their highways and the use of the same must be regulated so that all persons enjoying the privilege may not be subject to injury or death. As was said by the Supreme Court in Hendricks v. Maryland, supra,

"In the absence of national legislation covering the subject, the state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation of its highways of [fol. 53] all motor vehicles—those moving in interstate commerce as well as others * * * This is but an exertion of the police power uniformly recognized as belonging to the states and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a block or material burden to interstate commerce * * *. The amount of the charges and method of collection are primarily for determination by the state itself, and so long as they are reasonable and are fixed according to a uniform, fair, and practical standard, they constitute no burden on interstate commerce." * * *

The Supreme Court of Oregon, in Camas Stage Co. v. Kozer, supra, at page 97, after quoting Sec. 8, Art. 1, of the Constitution, said:

"Congress has exercised the power granted it in relation to interstate commerce in a variety of acts, but it has passed no statute that in any way inhibits the exaction by the state of the fees in question by way of compensation from the plaintiff for the privilege of driving its motor cars over the highways of this state. State laws may affect interstate commerce without conflicting with the constitutional provision appealed to.

Nor is the power to grant a franchise to whom it will a monopoly against law or public policy. Cooley's Constitutional Limitations, 7th Ed. 564; Haddad v. State, 201 Pac. 845 (Ariz.); People v. Wilcox, 100 N. E. 705 (N. Y.); Utilities Commission v. Garviloch, 181 Pac. 272, (Utah); Hatfield v. Lundin, 98 Wash. 657; Allen v. Bellingham, 95 Wash. 12. Nor does the 14th amendment create any right in a citizen to use the public property in defiance of the laws of the state. Davis v. Mass, supra. Lutz v. New Orleans, 225 Fed. 978. Dent v. Oregon City, supra.

What has been said precludes the necessity of discussing the question of tolls. We may add, however, that the Supreme Court in St. Louis v. Western Union Tel. Co., 148 U. S. 92, and in Western Union Tel. Co. v. Richmond, 224 U. S. 160, held exemption from payment of toll shall not grant unrestricted right to use public property, and in St. Louis v. Western Union Tel. Co., supra, the court said:

"It is a misconception, however, to suppose that the franchise or privilege granted by the Act of 1866 carries with it the unrestricted right to appropriate the public property of the state."

[fol. 54] In Kane v. New Jersey, 242 U. S. 160, Justice Brandeis for the court, said:

"It is clearly within the discretion of the state to determine whether or not the compensation for the use of its highways by automobiles shall be determined by way of a fee payable annually or semi-annually, or toll based on mileage, or otherwise."

From no viewpoint from which the issue can be approached can the plaintiff assert the right contended for. The interlocutory injunction is denied.

Footnote.—Other cases of interest but not pertinent to the issue before the court, are: Gas Co. v. Hallanan, State Tax Com'r, 257 U. S. 277; Eureka Pipeline v. Hallalan, State Tax Com'r, 257 U. S. 265; Lemke v. Farmers' Grain Co., 258 U. S. 50; 5th Ave. Coach Co. v. N. Y., 221 U. S. 467. Pullman Co. v. Kansas, 216 U. S. 56; State v. Nor. Pac. Express Co., 80 Wash. 309.

[File endorsement omitted.]

[fol. 55] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS

Comes now the defendant E. V. Kuykendall, Director of the Department of Public Works of the State of Washington, and moves the Court to dismiss the above entitled cause for the reason and upon the ground of lack of jurisdiction of the subject matter and parties to this cause by reason of the nonjoinder of indispensible and necessary parties defendant thereto.

This motion is based on all the files and records in the above entitled case and upon the affidavit of E. V. Kuykendall hereto attached.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General; E. W. Anderson, Assistant Attorney General, Solicitors for Defendant.

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF E. V. KUYKENDALL—Filed December 24, 1923

UNITED STATES OF AMERICA,
Western District of Washington,
Southern Division, ss:

E. V. Kuykendall, being first duly sworn on oath deposes and says: That he is the defendant named in the above entitled proceeding; that he is now and has been since on or about the effective date of chapter 111, of the Session Laws of 1921 of the State of Washington, the duly appointed, qualified and acting director of the department of public works of said state, and as such charged with the duty of administering the provisions of chapter 111, aforesaid; that Northern Pacific Railway Company, Great Northern Railway Company, Oregon-Washington Railroad and Navigation Company, American Railway Express Company, Park Auto Transportation Company, Thompson and Smith Transportation Company, Northwest Transportation Company, and Camas Stage Company are engaged in intrastate and interstate commerce or both and in the carriage of persons and property or both between the cities of Seattle, Washington, and Portland, Oregon, and intermediate points; that the Northern Pacific Railway Company, the Great Northern Railway Company, and the Oregon-Washington Railroad and Navigation Company, thru joint agreements, own, operate and maintain a rail line between Seattle and Tacoma Washington and Portland, Oregon, and furnish freight, passenger, express, and mail service

[fol. 57] between said points and to all intermediate points proposed to be served by plaintiff; that the American Railway Express Company is engaged in the transportation of express matter in intrastate and interstate commerce over the lines of the common carrier railroads last above mentioned and furnishes express service between Seattle, Washington, and Portland, Oregon, and to all intermediate points proposed to be served by plaintiff; that Park Auto Transportation Company, Thompson and Smith Transportation Company, Northwest Transportation Company, and Camas Stage Company are holders of Certificates of Public Convenience and Necessity duly and regularly issued to them by affiant as Director of the Department of Public Works of the said State under the provisions of Chapter 111 of the Session Laws of 1921 of the State of Washington; that the certificate holders hereinbefore named, operating motor propelled vehicles over the highways of the State of Washington between Seattle and Portland, have an exclusive right under the provisions of said chapter 111 to so operate their motor propelled vehicles in the carriage of persons and property both interstate and intrastate, and under the provisions of said chapter 111 their right to exclusively operate under said chapter 111 in the territory that they are serving cannot be interfered with or another certificate to so operate be granted save only when such existing auto transportation companies holding certificates will not provide service to the traveling and shipping public to the satisfaction of said Department, and then only after a hearing has been had and an order entered directing the certificate holders to furnish such additional service and a refusal or failure by said certificate holders to obey said order; that the auto transportation companies mentioned herein cover the entire route between Seattle, Washington and Portland, Oregon, and that a passenger seeking transportation by motor propelled vehicle from Seattle, or any point along the [fol. 58] route of said companies, for Portland, or a passenger seeking transportation by motor propelled vehicle from Portland for Seattle or any point in the State of Washington along the route of the named auto transportation companies, can do so, and obtain continuous passage, the said auto transportation companies having schedules so arranged and bus stations used in common so that such continuous passage is obtainable and that said auto transportation companies are now carrying passengers between Seattle and Portland and intermediate points.

Further than this deponent saith naught save that this affidavit is made in support of a motion to dismiss herewith attached.

E. V. KUYKENDALL.

Subscribed and sworn to before me this 23d day of December, 1923. Sam L. Crawford, Notary Public in and for the State of Washington, Residing at Olympia.

[File endorsement omitted.]

[fol. 59] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECISION—Filed January 7, 1924

On December 7, 1923, this court denied an interlocutory injunction on plaintiff's application. Upon that application it did not appear that the plaintiff had complied with all of the laws of Washington with relation to the operation of motor vehicles on public highways, and it was stated at bar that the plaintiff declined to so comply. In deciding the case the court said:

"The state may not, under the guise of regulation, arbitrarily prohibit the use of the highway to the plaintiff. Such issue, however, is not before the court, as the plaintiff has not complied with any of the provisions of the challenged act and at bar announced that he did not propose to comply with the provisions of the act for the reason that he had a right paramount to its provisions. When the plaintiff disposes himself in harmony with the reasonable provisions of the act and is denied permission to operate, the courts are open to grant such relief as may be warranted by the law and facts."

Thereafter the plaintiff was granted permission to file an amended complaint, in which he states that he has complied with all of the provisions of the laws of the State of Washington, and at bar asserts that he is willing to comply with all of the laws of the state, and the rules and regulations of the Department of Public Works of the State, and further states that the defendant refused to grant said certificate or license to the plaintiff on the sole ground that the owners of four certificates operating between different termini could, by interchanging passengers at common termini, engage in interstate commerce between Seattle, Washington, and Portland, Oregon, and would furnish, together with the railroads operating between said points, adequate transportation, and further, that the plaintiff had not shown sufficient financial ability to warrant the Director in issuing a certificate to engage in said interstate commerce, as, if it were granted, the plaintiff might not be able to operate; that the plaintiff had complied with all the provisions of Chapter 111 insofar as he had been permitted so to do by the defendant, and that he was ready, willing and able, financially and otherwise, to comply with all the provisions of said law, and that he offered so to do.

An interlocutory injunction is asked. In response to *to* the show [fol. 60] cause order the defendants filed an affidavit, which is not denied, setting out a copy of the order of adjudication of the Department of Public Works of Washington upon the application of the plaintiff for a certificate of convenience and necessity, in which the department found that the plaintiff was not, prior to January 15, 1921, operating as an auto transportation company over the proposed route, and was entitled to a certificate of public convenience and necessity solely upon the ground of public convenience and necessity, and further found that the N. P. Ry. Co., the G. N. Ry. Co.,

and the O. W. R. R. & Nav. Co., through joint agreement, operate and maintain a rail line between Seattle and Tacoma, Washington, and Portland, Oregon, carrying freight, passengers, express and mail between said points and to all intermediate points proposed to be served by said applicant, and that said railways operate six passenger and express trains daily from Seattle to Portland and six passenger trains and express trains daily from Portland to Seattle, leaving both termini at reasonable and convenient hours of the day and night, thereby furnishing to the travelling public first class, comfortable, convenient and expeditious service, that in connection with the passenger service furnished by the railroads, they operate sleeping cars and dining cars, and care for the needs and comfort of travellers upon said lines. A reasonable number of passenger, express, and mail trains adequately serve the needs and convenience of the intermediate points, it was found by the department; that the applicant proposed to operate over the Pacific Highway, a main north and south state road, that said state highway practically parallels the railway lines above mentioned for the entire distance from Seattle to Portland and passes through all the intermediate points above mentioned; that all points along the said Pacific Highway from Seattle to the Columbia River and Portland, Oregon, through which said applicants and each of them propose to pass, and the only route proposed by said applicants, was already served by other auto transportation companies, all operating under certificates of public convenience and necessity heretofore granted, said auto transportation companies having provided adequate terminal facilities, including waiting rooms and comfort stations for passengers and garages for the inspection and repair of busses; that said auto transportation companies now have their schedules so coordinated as to provide a daily service between Seattle and Portland. That "a person may leave Seattle in the morning and by connecting carriers arrive in Portland the same day, and vice versa;" that such service is reasonable and adequate, and entirely sufficient to care for interstate travel at the present time. Said carriers testified at the hearing before the Director of Public Works, as disclosed by the record, that they were willing to provide additional through service between Seattle and Portland at any time said Department of Public Works should so direct, and that if public convenience should require such additional service these carriers should be entitled to an opportunity to furnish it. The findings further state that A. J. Buck proposes to furnish service from Seattle and other points heretofore mentioned to Portland, making two trips per day each way. The trip from Seattle to Portland requires about nine hours running time and it would be necessary to make stops approximately at the terminal points of the present transportation companies to permit passengers to eat, visit comfort stations, and to permit inspection and repair of the auto busses; that it would be necessary to furnish at these points adequate [fol. 61] facilities such as waiting rooms, comfort stations, etc., for the passengers, and garages for repairs upon auto busses. The expense of this duplication of facilities and service would undoubtedly in time be reflected in increased charges to the travelling public. The

testimony at the hearing did not show that these applicants or either of them had made adequate arrangements for any of these facilities; that the testimony did not show that said applicants or either of them were possessed of financial ability to successfully undertake the operation of such a venture. It affirmatively appeared, according to the findings of said Department of Public Works, that both A. J. Buck and the Interstate Motor Transit Company were practically without means and were depending for finances upon the promises of other parties, which promises were vague and conjectural and not shown to be enforcible; that public convenience and necessity did not require the operation of the service sought or proposed to be given by the applicants or either of them and it was therefore ordered that the plaintiff's application for certificate of public convenience and necessity to operate as auto transportation in furnishing passenger and express service between the points heretofore indicated, be denied.

With this application were consolidated other applications, and parties appeared as follows, at the hearing:

Albert J. Buck, D. V. Halverstadt, of Guie & Halverstadt, Attorneys, Seattle.

Interstate Motor Transit Co., W. R. Crawford, Attorney, Seattle.

Park Auto Transportation Company, Thos. R. Murphine, Attorney, Seattle.

Thompson & Smith Transportation Company, Thos. M. Vance, Attorney, Olympia.

Puget Sound Electric Ry. Co., C. W. Howard, Attorney, Bellingham.

C. M. & St. P. Ry. Co. and American Railway Express Co.. L. B. da Ponte, Attorney, Seattle.

O. & W. R. R. & Nav. Co., W. A. Robbins, Attorney, Portland.

Great Northern Railway Co., Thomas Balmer and A. J. Clynch, Seattle.

A protest against the granting of a certificate of convenience and necessity to the plaintiff was filed by the following concerns; with the Department of Public Works:

Park Auto Transportation Co.
Thompson and Smith Transportation Co.
Northwest Transportation Co.
Camas Stage Co.
Chicago, Milwaukee & St. Paul Ry. Co.
Northern Pacific Ry Co.
Great Northern Ry Co.
Oregon-Washington R. R. & Nav. Co.
American Railway Express Co.
Tenine Citizens Club.
Puyallup Commercial Club.
Centralia Chamber of Commerce.
Tacoma Chamber of Commerce and Puget Sound Electric Railway.

[fol. 62] W. R. Crawford, Esq., Solicitor for Plaintiff.

Hon. John H. Dunbar, Attorney General, State of Washington; Raymond W. Clifford, Esq., and E. W. Anderson, Esq., Assistant Attorneys General of the State of Washington, Solicitors for Defendant.

Before Rudkin, Circuit Judge, and Cushman and Neterer, District Judges

NETERER, District Judge:

Every issue now presented has been disposed of in Interstate Motor Transit Co. v. Kuykendall, 284, Fed. 882, and cases cited, and in decision in this cause filed December 7, 1923, and cases cited, except whether, under the guise of regulation, the defendant arbitrarily prohibits the use of the highway to the plaintiff.

The State of Washington has control of its highways—cases above cited — and the state power continues where the subject is peculiarly of local concern until Congress acts and by its valid interposition limits the exercise of local authority. Minn. Rate Cases, 230 U. S. 352. Penn Gas Co. v. P. S. Com. 252 U. S. 25, Mo. P. R. Co. v. Larrabe Flour Mill Co. 211 U. S. 612. While those cases have relation to intrastate rates, the principle enunciated is peculiarly applicable to the issue here.

The challenged law is not designed to regulate interstate commerce. Its purpose is of peculiar local concern, that of promoting safety, convenience, welfare, health and comfort of the public in the use of highways constructed and maintained at public expense—Northern Pac. Ry. Co. v. Schoenfeldt, 23 Wash. Dec. 299; Interstate Motor Transit Co. v. Kuykendall, supra, and cases cited,—which the state may do through its police power. Hendricks v. Md. 235 U. S. 610; Kane v. New Jersey, 242 U. S. 160.

The plaintiff has no right to use the highway as a common carrier for hire. It is only a privilege which may be regulated by the state [fol. 62½] in the absence of legislation by the Congress, having due consideration for the safety, health, convenience, welfare, and comfort of the travelling public, and includes those travelling in public conveyances and those travelling in private conveyances upon the highway. The record before the court is conclusive that the privilege withheld from the plaintiff was not arbitrarily denied under the guise of regulation. It is not necessary to add or multiply words or phrases. What has been here said, and in the cited cases, is conclusive. The interlocutory injunction is denied.

FOOTNOTE.—Appended are excerpts from the decision of the Department of Public Works of Washington.

California Railroad Commission, P. U. R. 1920—C-639, In re Wilson & Co., said:

"The evidence in this proceeding does not warrant the commission granting the order herein sought for the reason that there is no showing that existing lines are unable to furnish transporta-

tion by automobile stage over the route herein sought; and if a through route and joint rate is desired by the public, and existing stage lines cannot themselves agree on an adjustment of schedules and rates which will make possible a through route and joint rate between the points sought to be served by applicant, complaint to the Commission that a through route and joint rate is necessary will receive investigation, and an order of the Commission will issue based on the evidence adduced at a public hearing. The remedy for the adjustment of conditions which may not be desired by the public is not the establishment of a competing line, thereby dividing the traffic to the extent that existing authorized lines are unable to render the character of service demanded by the public and required by the regulation of this Commission."

New York Pub. Serv. Com., In Re Graves, P. U. R. 1920—E 131, said:

"It has been lately held by the California Railroad Commission In re P. A. Wilson & Company. P. U. R. 1920C, 635, decided February 11, 1920, that a certificate to operate an auto stage service [fol. 63] will not be granted for the purpose of affording through service between designated points where existing lines render adequate service between intermediate points.

"This I think, is consistent and entirely in line with the practice of this Commission to discourage competition where existing lines are rendering adequate service, and the position is not changed by the fact that the proposed line in question asks to render a through service where such service may be availed of only by using a succession of established carriers.

"In this, as in other cases, competition, not demanded to serve a public necessity, will tend to the demoralization and perhaps destruction of the facilities now enjoyed, and thus, in the end, work to the disadvantage and not the convenience of the public."

The Illinois Commerce Com., in Re Clark Truck Co., P. U. R. 1923-A, page 328, said:

"Under such conditions this Commission will not deliberately authorize the establishment of a directly competing motor vehicle line when the evidence shows that the localities involved are being served in a reasonably adequate manner, and that the intrusion of a competing line would seriously impair the ability of the railway line to render improved service commensurate with the needs and demands of the community, industries and persons served and would operate to the loss, detriment and damage of the railway."

And in Re Austin Brothers Transfer Co., P. U. R. 1923-C Page 222, the Illinois Commerce Com. said:

"The Commission further finds that in passing upon and determining the question of the issuance of a certificate of convenience and necessity to a motor bus line authorizing it to engage in the transportation of passengers and baggage for hire, or in passing

upon the granting of a certificate of convenience and necessity to one of two competing motor bus lines, both of which propose to engage in such business over substantially the same route, it is important and essential that the applicant shall have such a financial responsibility, such an operating experience and such a guarantee of sufficient business as to warrant a successful operation of a permanent motor bus enterprise, and that the persons interested in the operation of such motor bus lines have such an experience in motor bus operation and such a general business experience and ability and officers of such a general business experience and ability that it will assure to the Commission that if operation of a motor bus line is commenced under a certificate of convenience and necessity, it will become a permanent part of the transportation system of the state, and particularly of the community through which it proposes to operate.

"The Commission believes that the temporary operation of any transportation system within a community, whether it be in the form of a motor bus line or in some other form, which does not possess the certainty and security of developing into a permanent operation, and which lacks those particular features which are herein [fol. 64] described with reference to business ability of the utility and of its officers, is not a public convenience and necessity and that without proof of such facts a utility does not possess the composite parts necessary to so serve the public as to satisfy public convenience and necessity, and that in such instances the application made for a certificate of convenience and necessity should be denied."

And the same Commission in Re O. L. Bromley said:

"A part of the route proposed to be traversed by petitioner's motor vehicles parallels the street railway system in the city of Decatur and the granting of a certificate of convenience and necessity to the petitioner herein, if the route traversed is parallel with the street railway system, creates dual service the necessity for which is not apparent upon this record.

"The record fails to show the inadequacy of the present facilities of the street railway service. It will always be true that the more service rendered, the greater convenience to the public, yet the duplicating of service necessarily means a greater cost and such duplicate service will not be authorized unless substantial justice and a necessity for additional transportation service is manifest."

[File endorsement omitted.]

[fol. 65] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO DISMISS ON ACCOUNT OF WANT OF JURISDICTION—Filed January 21, 1924

This cause coming on to be heard upon the motion of E. V. Kuykendall, Director of Public Works, of Washington, to dismiss the

same on account of want of jurisdiction and lack of indispensable parties, and the Court having heard the arguments of counsel and being full- advised in the premises,

It is ordered, adjudged and decreed that said motion be and the same is hereby denied.

To all of which the defendant excepts and such exceptions are hereby allowed.

Enter:

Jeremiah Neterer, Judge.

[File endorsement omitted.]

[fol. 66] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing pages numbered one to 66, inclusive, contain a true and correct transcript of the records and proceedings in the case of A. J. Buck, Plaintiff, versus E. V. Kuykendall, Director of Public Works of the State of Washington, Defendant, Cause No. 189-Equity, as required by the præcipes of Attorneys for the Appellant and Appellee herein, filed and herein shown as the originals appear on file and of record in my office in said District at Tacoma.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the Appellant and of the Appellee herein, for making record, certificate and return to the Supreme Court of the United States, in the above entitled cause, to-wit:

Clerk's Fees (Sec. 828 R. S. U. S.) for making record, certificate and return for appellant, 60 folios @ 15¢ each.....	$9.00
Clerk's Fees for making record and return for appellee, 112 folios @ 15¢ each	16.80
Certificate of Clerk to Transcript, 3 folios @ 15¢ each and Seal	.65

Attest my hand and the seal of said District Court, at Tacoma, in said District, this 10th day of March, A. D. 1924.

F. M. Harshberger, Clerk, by Alice Huggins, Deputy.

Endorsed on cover: File No. 30,234. W. Washington D. C. U. S. Term No. 924. A. J. Buck, appellant, vs. E. V. Kuykendall, Director of Public Works of the State of Washington. Filed March 29th, 1924. File No. 30,234.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. ~~324~~. 345

A. J. BUCK, APPELLANT,

v.

E. V. KUYKENDALL, DIRECTOR OF PUBLIC WORKS OF THE STATE OF WASHINGTON, APPELLEE.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

PETITION FOR A STAY.

MERRILL MOORES,
Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 924.

A. J. BUCK, APPELLANT,

v.

E. V. KUYKENDALL, DIRECTOR OF PUBLIC WORKS OF THE STATE OF WASHINGTON, APPELLEE.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

PETITION FOR A STAY.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, A. J. Buck, is attempting to operate an Interstate Motor Bus line between Seattle, Washington, and Portland, Oregon, over the Pacific Highway, a Government

aided road, toll exempt under the Federal Road Aid acts. Section 4, Chapter III, Laws of the State of Washington, as amended, 1923, provides that no auto transportation company may operate in that State without a certificate from the Director of Public Works. The same section provides that when an applicant requests a certificate to operate in a territory already served by a certificate holder, the Director of Public Works shall have power to grant such a certificate only in case the transportation companies already serving the territory in question do not provide transportation to the satisfaction of the Director. Petitioner applied to the Director of Public Works for such a certificate, which was refused on the ground that there was no public convenience and necessity for such interstate motor bus transportation. The reason given was that there was already a certificate holder operating between Seattle and Tacoma, Washington; another certificate holder operating between Tacoma and Olympia; a third between Olympia and Kelso, and a fourth between Kelso, Washington, and Portland, Oregon; all operating on the Pacific Highway and the four together covering the entire distance between Seattle, Washington, and Portland, Oregon. No certificate has been issued authorizing a through line between Seattle, Washington, and Portland, Oregon, nor is there such a through line now operating.

Prior to applying for a certificate to operate between Seattle, Washington, and Portland, Oregon, petitioner interviewed over a thousand persons in that section and found there was a general demand for such a through service. In fact, there was such a service maintained by another company in the first part of 1923. This line was compelled to

cease operations because of a refusal of the Director of Public Works to grant a certificate, coupled with threats of prosecution and the penalties prescribed in Chapter III, section 4, above referred to. While it operated the line it was financially successful on a fare of $5.50 from Seattle to Portland, Oregon.

Petitioner made it clear to the Director of Public Works of Washington that he would not use the said "Pacific Highway" to do business on but simply as an interstate thoroughfare, and would take on and discharge passengers on private property already acquired.

Petitioner was granted a license by the State of Oregon to operate his motor vehicles on the "Pacific Highway" in that State as part of a continuous, interstate service between Portland, Oregon, and Seattle, Washington. In order to preserve his rights under this license petitioner was required to commence operations before November 12, 1923, and upon continued refusal on the part of the Director of Works of the State of Washington, filed his complaint in the District Court of the United States for the Western District of Washington on October 31, 1923. On the same day a temporary restraining order was granted, upon giving $500 bond. Such order restrained said Kuykendall, Director of Public Works, from enforcing the provisions of Chapter III, section 4, as amended. Petitioner thereupon commenced operation of his through line between Portland, Oregon, and Seattle, Washington, charging a rate 25 per cent less than other carriers, the business increasing all the time.

On December 7, 1923, the District Court handed down its decision denying an interlocutory injunction. (295 Fed., 197, Advance Sheets.) In its opinion it adverted to the

fact that the record did not show that petitioner had complied with the regulatory provisions of the Washington law relative to operation of motor vehicles on the public highways. Thereafter, permission was granted petitioner to file an amended complaint, showing such compliance with the laws of the State of Washington. Upon filing such amended complaint showing compliance with the provisions of the laws of Washington, the case came on again for hearing and on January 7, 1924, the District Court handed down a supplemental opinion and entered a final decree denying an interlocutory injunction and dismissing the bill. The ground taken generally by the District Court was that the requirement of a certificate as a condition of doing business, and the prohibition in the State Statute against issuing such certificate for a territory already served to the satisfaction of the Director of Public Works, was a valid police regulation of the State. From this final decree petitioner has perfected an appeal to this Court, on the grounds:

1. That the provision of Chapter III, above referred to, prohibiting the Director of Public Works from issuing a certificate in a territory served satisfactorily to him by other certificate holders, amounts to a restriction upon interstate commerce. It is obvious that, however properly said Director may be the judge of the public necessity and convenience of said service to the people of Washington, he is not the judge, nor can a Washington statute make him the judge, of the necessity in the State of Oregon for through service to points in Washington. The Federal control over interstate commerce was designed to prevent one State undertaking to be the judge of the method by which another State

might do business with it, or through it with another State or foreign country.

2. There being no interstate motor bus line between Seattle, Washington, and Portland, Oregon, the provision of Chapter III, favoring certificate holders and prohibiting issuance of a new certificate in their territory, amounts to a prohibition against interstate commerce in that territory.

3. In the same way, there is a discrimination against *interstate,* in favor of *intrastate,* commerce, based upon mere priority in time.

4. There is the creation of a monopoly in the present certificate holders on Federal Aided Interstate Highways.

5. There is a prohibition against carrying on interstate commerce under the same rules and regulations as intrastate commerce.

6. There is a violation of the State's contract with the Federal Government covering said Federal Aided Interstate Highway.

7. There is a taking of property without due process of law, as above described.

The amount involved in this case exceeds $3,000 besides costs.

After the final decree herein, a written stipulation was made with the said Kuykendall, Director of Public Works, that the bond of $500 required for the temporary restraining order should be cancelled and released on the ground that no damage had resulted from the issuance of said restraining order.

On the other hand, petitioner, if not allowed to continue in business pending the appeal to this Court, will lose not only his franchise in Oregon, but all his fees, insurance premiums paid under Washington and Oregon laws, and all the profits from operation of his line, and the public will lose the convenience of said lines reflected in the profits from the operation thereof.

Application for a stay was made to the District Court and was by that Court denied on March 31st last, because the case is pending in this Court on appeal.

Wherefore, A. J. Buck, petitioner herein, prays that an order be made, restraining, until the final determination by this Court of the appeal herein, E. V. Kuykendal' Director of Public Works of the State of Washington, appellee herein, his agents, servants, employees, from arresting or causing the arrest or in any way interfering with or obstructing the appellant, his agents, servants, employees and drivers from engaging in interstate commerce by carrying passengers and their personal baggage on motor propelled vehicles on the public highways of the State of Washington between the City of Seattle, Washington, and the southern boundary line of Washington at Vancouver, Washington, or intermediate points, upon the ground that said appellant has not been granted a certificate or license to engage in such interstate commerce, as provided for in said Chapter III, of the session laws of 1921, as amended, of Washington; but such order shall in no way protect the appellant, his agents, servants, employees and drivers against arrest for the violation of any provisions of the laws of the State of Washington, except such provision relating to certificates contained in said Chapter III, as amended, or for such order as may be proper, the

premises considered, agreeable to the usages and practices of law.

CITY OF WASHINGTON,
District of Columbia, ss:

Merrill Moores, being first duly sworn, on oath deposes and says: That he is counsel for the appellant in the above entitled cause, that he has read the foregoing petition for a stay and knows the contents thereof, and that the matters set out therein are true, except as to the matters set out on information and belief, and as to such matters it is true as he verily believes.

MERRILL MOORES.

Subscribed and sworn to before me this 17th day of April, 1924.

C. ELMORE CROPLEY,
Notary Public, District of Columbia.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 924.

A. J. BUCK, APPELLANT,

v.

E. V. KUYKENDALL, DIRECTOR OF PUBLIC WORKS OF THE STATE OF WASHINGTON, APPELLEE.

On Appeal from the District Court of the United States for the District of Washington.

To Honorable JOHN H. DUNBAR,
Attorney General of Washington.

SIR:

Please take notice that a petition for a stay in the above-entitled cause, a copy of which is handed you herewith, will be submitted to the Supreme Court of the United States on April 21st next.

MERRILL MOORES,
Counsel for Appellant.

Service of a copy of the foregoing petition is acknowledged this 17th day of April, 1924.

JOHN H. DUNBAR,
Attorney General of Washington.